BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DEBBIE A. SMITH	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,016,779
CARDIOVASCULAR CONSULTANTS	)	
Respondent	)	
AND	)	
	)	
CINCINNATI INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Both claimant and respondent appeal the May 31, 2005 Award of Administrative Law Judge Robert H. Foerschler. Claimant was denied permanent benefits after the Administrative Law Judge (ALJ) determined claimant had failed to prove any permanent disability from her injuries suffered with respondent. Claimant was, however, awarded future medical care at respondent's expense, with respondent being ordered to provide a physiatrist or other provider to treat claimant's condition. The Appeals Board (Board) heard oral argument on October 4, 2005.

APPEARANCES

Claimant appeared by her attorney, Robert W. Harris of Kansas City, Kansas. Respondent and its insurance carrier appeared by their attorney, D'Ambra M. Howard of Overland Park, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the ALJ. Additionally, the parties stipulated at oral argument before the Board that the September 10, 2004 report of rehabilitation specialist George Varghese, M.D., regarding his August 30, 2004 examination of claimant, is a part of the record and may be considered for the purposes of this appeal. Further, the parties stipulated that the attachments to the preliminary hearing of July 15, 2004, are also part of the record and may be considered by the Board for the purposes of this appeal.

ISSUES

1. Did claimant suffer accidental injury arising out of and in the course of her employment?

2. What is the nature and extent of claimant's injury and/or disability?

3. Is claimant entitled to follow-up treatment? At oral argument, claimant's attorney agreed that the only condition for which claimant would be entitled to any permanent disability benefits or future medical care would be claimant's right upper extremity condition.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds as follows:

Claimant worked as a medical transcriptionist for respondent for approximately three and a half years, using a modem out of her home. Claimant typically spent most of an 8-hour day typing dictation on a computer keyboard. Claimant did acknowledge that she would stop her typing duties in order to look up things in the dictionary and other books and to do research on the internet.

Beginning in May of 2002, and continuing through October 21, 2003, claimant began developing arm pain, neck pain and shoulder pain. Claimant's pain was bilateral, with the right being worse than the left. Claimant testified that the more she would type, the worse her pain would get. Claimant last worked for respondent on October 21, 2003, but remained on FMLA leave through March 25, 2004, at which time she was officially terminated from her employment with respondent.

Claimant was referred for examination and treatment to a multitude of health care providers. These health care providers included radiologists, neurologists, orthopedic surgeons, physiatrists, internal medicine specialists, neurosurgeons, thoracic and cardiovascular surgeons and rheumatologists. Claimant underwent an EMG in July of 2002 (which showed no evidence of nerve entrapment or neuropathy), an MRI scan, a cervical myelogram, a CT scan, as well as numerous examinations. The EMG was normal. The cervical myelogram and CT scan indicated foraminal narrowing mainly on the left side. However, claimant's symptoms were primarily on the right side. The EMG failed to show any evidence of radiculopathy or carpal tunnel syndrome. The MRI displayed a herniated disc mainly on the left side, again with her symptoms primarily on the right side.

Claimant was referred for an examination to board certified orthopedic surgeon Edward J. Prostic, M.D. This examination, which took place on November 3, 2004, was at the request of claimant's attorney. Dr. Prostic reviewed the MRI and CT myelography, diagnosing claimant with right carpal tunnel syndrome and right lateral epicondylitis. He also indicated probable mild rotator cuff tendinitis. Dr. Prostic assessed claimant a 20 percent impairment to the right upper extremity at the shoulder level, with recommendations for future treatment, including a wrist splint, a gripping device to strengthen the forearm muscles, steroid injections and possible carpal tunnel decompression. Dr. Prostic acknowledged he found no objective medical evidence to support the subjective complaints in claimant's case. He acknowledged that claimant had been diagnosed by rheumatologist Mark Box, M.D., as having fibromyalgia. However, based upon his examination of claimant, Dr. Prostic did not believe fibromyalgia was the appropriate diagnosis. He testified that the MRI and CT myelogram to claimant's upper extremities were not normal, but they showed no basis for claimant's right upper extremity complaints. He did testify that claimant had clinical evidence of right carpal tunnel syndrome and right lateral epicondylitis, as well as mild rotator cuff tendinitis. He acknowledged he had no x-rays of the shoulder to confirm the rotator cuff tendinitis diagnosis and had only one positive sign of rotator cuff dysfunction. He acknowledged that his diagnoses were all based to some extent on the subjective complaints of claimant or his own speculation.

Claimant was referred for an examination to Chris D. Fevurly, M.D., board certified in internal and occupational medicine. This examination occurred on March 2, 2004, and was prompted at the request of a nurse case manager working for respondent. Dr. Fevurly noted claimant had a history of chronic muscle pains and joint pains beginning as early as 1999. She had been diagnosed several years earlier with fibromyalgia disorder and had received treatment for fibromyalgia for months or even years prior to her reported onset of symptoms related to her employment with respondent. Dr. Fevurly was unable to corroborate any of her subjective complaints by objective testing, finding no positive objective findings in terms of her clinical examination. The CT myelogram of her neck and low back showed no evidence of neurogenic compromise, and her evaluation, in essence, was normal. He testified that the findings on the myelogram and MRI were the types of findings he would expect to find in a patient of claimant's age. He opined that, in essence, those findings were normal. He stated that it would be abnormal to have a perfectly normal CT myelogram at claimant's age. He diagnosed claimant with chronic somatoform disorder, which he described as a chronic somatization disorder, which he further described as a complex interaction of psychological, social and behavioral factors that influence a person's perception and expression of pain. He believed that claimant has chronic pain, but that there is nothing rateable about this pain, as it is the result of her subjective complaints about pain. He believed there is no objective evidence for permanent impairment from the work activities which could be based upon the fourth

edition of the AMA *Guides*.[1] He disputed Dr. Prostic's diagnosis of right carpal tunnel syndrome and right lateral epicondylitis, finding that claimant did not meet the clinical test for those syndromes. He testified that claimant's previous electrodiagnostic testing showed no evidence of peripheral nerve entrapment. He further disputed Dr. Prostic's testimony that claimant has a mild rotator cuff tendinitis, finding that claimant actually has a full range of motion in her shoulder joints, a negative Hawkins' maneuver and a negative Neer's impingement test. There was no weakness on rotator cuff strength testing, and claimant had no clinical evidence for impingement or rotator cuff tendinitis. Claimant's symptoms were described as diffuse, generalized throughout the right arm and nonspecific in nature. He noted that claimant had struggled for years with chronic pain problems and testified her current inability to do what she wants to do has nothing to do with disease or impairment. It has to do with nonphysical factors, i.e., her inability to cope with job duties.

Claimant was referred for an independent medical examination to board certified rehabilitation specialist George Varghese, M.D., of the University of Kansas Medical Center. Dr. Varghese examined claimant upon referral from the ALJ, with the examination occurring on August 30, 2004. Dr. Varghese reviewed a plethora of medical reports and tests on claimant, including the EMG performed in July of 2002 which was reported as normal. Dr. Varghese reviewed the medical reports of Dr. Box and rheumatologist Steve Ruhlman, M.D., which indicated no evidence of inflammatory arthropathy. Both Dr. Box and Dr. Ruhlman diagnosed claimant with fibromyalgia. Dr. Varghese discussed the MRI, cervical myelogram and CT scan which showed foraminal narrowing mainly on claimant's left side, but noted that the symptoms were primarily on the right side. He reviewed the medical reports of neurologists Steven M. Arkin, M.D., and Gordon R. Kelley, M.D. In October 2003, Dr. Kelley repeated the EMG, which again showed no evidence of radiculopathy or carpal tunnel syndrome. Dr. Varghese discussed the Doppler studies performed by Michael E. Gorton, M.D., of MidAmerica Thoracic and Cardiovascular Surgeons, which indicated that claimant did not have thoracic outlet syndrome. Claimant's range of motion to the neck was normal, although there was minimal limitation of rotation to the right, with tenderness in both upper trapeziuses, as well as anterior neck and the suboccipital region. Both upper extremities displayed normal range of motion and muscle strength. There was tenderness in both lateral elbows, more on the right than the left. But none of the joints showed any inflammatory changes or deformities. There was no atrophy of the muscles and the long flexors and extensors had normal strength. Claimant had no definite sensory loss to the upper extremities, and both Tinel's and Phalen's signs were negative.

Dr. Varghese found that claimant predominantly had right elbow pain, which gets worse with continuous use of the arm, and a history of pain in the neck and back. He found no clinical findings suggestive of cervical radiculopathy, his clinical examination did

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[1] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

not suggest chronic epicondylitis and the examination did not suggest radial nerve pathology. He did find tender points consistent with a diagnosis of fibromyalgia, which had been earlier diagnosed by Dr. Box. Dr. Varghese determined the overuse or myofascial pain syndrome in the right upper extremity is more likely secondary to the underlying diagnosis of fibromyalgia and not as a result of any work-related injuries. He also testified that thoracic outlet syndrome was highly unlikely, as claimant had no neurovascular symptoms or signs of neurovascular compression and she had negative EMGs and Doppler studies.

The Board finds that claimant has failed to prove, based upon this record, that she suffered accidental injury arising out of and in the course of her employment. Claimant has a long history of upper extremity symptoms including pain at multiple levels for which there is no objective evidence or positive testing. The only physician willing to provide claimant with any functional impairment as a result of her work-related activities is Dr. Prostic, who acknowledges that all of his diagnoses are based either on subjective complaints or speculation on his part. The Board cannot give Dr. Prostic's opinion as much weight as the opinions of Dr. Fevurly and Dr. Varghese.

In workers compensation litigation, it is the claimant's burden to prove her entitlement to benefits by a preponderance of the credible evidence.[2] The Board finds, based upon this evidence and record, that claimant has failed to prove that she suffered accidental injury arising out of and in the course of her employment with respondent or that she suffered any permanent impairment as a result of her work activities with respondent. The Board, therefore, affirms the denial by the ALJ of any permanent impairment in this matter, but reverses the ALJ's award of ongoing future medical care for the injuries alleged by claimant to have occurred during her employment with respondent through a series of accidents culminating on October 21, 2003, her last day worked.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Robert H. Foerschler dated May 31, 2005, should be, and is hereby, affirmed with regard to the denial of permanent impairment to the claimant, but reversed with regard to the award of ongoing medical care.

IT IS SO ORDERED.

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[2] K.S.A. 44-501 and K.S.A. 2003 Supp. 44-508(g).

Dated this ____ day of December, 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Robert W. Harris, Attorney for Claimant
D'Ambra M. Howard, Attorney for Respondent and its Insurance Carrier
Robert H. Foerschler, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director